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IN THE

Supreme Court of the United States

October Term, 1958.

No. 147.

IRENE HILL, Administratrix of the Estate of BENJAMIN HILL, Deceased,

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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Petitioner, IRENE HILL, Administratrix of the Estate of Benjamin Hill, Deceased, respectfully prays that this Court grant rehearing of its order of March 2, 1959, denying the petition for writ of certiorari, — U. S. —,[1] and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above-entitled case, as prayed for in the petition filed herein on July 2, 1958.

1. Mr. Justice Douglas was of the opinion that certiorari should be granted.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. The Decision of the Court Below Is in Direct Conflict With United N. Y. & N. J. S. H. P. Assn. v. Halecki, Wherein This Court Affirmed the Second Circuit in Applying Comparative Negligence to a Longshoreman's Death Action.

In *United N. Y. & N. J. S. H. P. Assn. v. Halecki*, — U. S. —,[2] this Court considered the instant issue: whether, in a federal diversity suit for maritime tort, under a state wrongful death act (there, New Jersey), the suit is governed by the state common law rule of contributory negligence or by the maritime rule of comparative negligence. This Court affirmed the decision of the Second Circuit that comparative negligence applies. In the instant case, the opposite conclusion was reached by the Third Circuit, and, this Court, in denying the petition for certiorari, allowed that holding to stand, although it was in direct conflict with this Court's decision in *Halecki*.

In *Halecki*, the Second Circuit had held that, under the doctrine of this Court in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, "rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence, whether suit upon it is in the admiralty or in an action at law, state or federal" and that "to deny the exemption to the next of kin seems to us to the last degree capricious and irrational."[3] The Court specified that it agreed with the same holding by the First Circuit in *O'Leary v. United States Line Co.*, 215 F. 2d 708, 711, and disagreed with the Third Circuit in *Curtis v. Garcia*, 241 F. 2d 30, 36 (App. p. 17). It was the *Curtis* case upon which the Third Circuit

2. October Term, 1958, No. 56, decided February 24, 1959.
3. 251 F. 2d 708, 712-13.

based its decision in the instant case (App., p. 15). In affirming *Halecki* on this point, then, this Court in effect indicated its disagreement with the theory propounded by the Court below in *Curtis* and in the present case.

In view of the status of the cases, the present matter should be reviewed and the judgment below reversed, so that it may be brought into consonance with this Court's most recent decision in *Halecki* and effectively resolve the conflict among the circuits.

2. The Decision by the Court Below That the Pennsylvania Wrongful Death Act Created a New Cause of Action, and Not Just a Remedy, Conflicts With Decisions by the Supreme Court of Pennsylvania Upon That Specific Issue.

The decision of the Court below was based upon the conclusion that the Pennsylvania Wrongful Death Act created a *new cause of action*, rather than merely provided a *remedy*. This conclusion was in direct disagreement with the decisions of the Pennsylvania courts.

The Supreme Court of Pennsylvania, in *specifically* considering the question of just what the Pennsylvania Wrongful Death Act [4] provided, has consistently held that such statute presents only a *remedy* for a right existing elsewhere; *that the right of action for death is created by the negligent or wrongful act committed.*[5] The Pennsylvania court has held that "the cause of action is the wrongful act," and "right" or "cause" of action means the violation of the duty, and not the result thereof. *Fisher v. Hill*, 368 Pa. 53, 58-60, 81 A. 2d 860; *Simodejka v. Williams*, 360 Pa. 332, 62 A. 2d 17; *Fields v. Philadelphia Rapid Transit Co.*, 373 Pa. 282, 285, 117 Atl. 59; *Centofanti v. P. R. R.*, 244 Pa.

4. 12 Pa. Stat. Ann. 1601-4.

5. This is in agreement with the conclusion of this Court in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. at 409, that the "right of recovery" is "for unseaworthiness and negligence" and not for the injury or death.

255, 261-2, 90 Atl. 558; *Hill v. P. R. R.*, 178 Pa. 223, 35 Atl. 997.

In the *Fisher* case (368 Pa. at 58), the Pennsylvania court alerted us to the danger of using the terms inadvisedly, quoting the special warning voiced by this Court in *U. S. v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67, concerning the very terms at issue here. Disregard of this warning has caused many courts to lose sight of the important distinctions emphasized in *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383-4.

In holding then, that the right of action here is "rooted in" state law, the court below misapplied language to meaning, and decided Pennsylvania law in complete disagreement with the Supreme Court of Pennsylvania, where that Court has considered the specific point in question. In so doing, the court below impressed upon the maritime tort a measure of liability foreign to maritime law *and* unintended by the state law. This was clearly erroneous. *The Vessel M/V Tungus v. Skovgaard*, — U. S. —;[6] *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 408-9.

In the *Tungus* case, this Court, discussing the New Jersey death statute, pointed out that New Jersey courts have not spoken upon the question whether, in a case such as this, maritime law or common law is applicable under the statute. Thus, the Court of Appeals was permitted to make its own interpretation, and applied the full effect of the federal maritime law, which it found the statute had incorporated.

The basis upon which this Court looked to New Jersey law in the first place was the conclusion that New Jersey had created the original right itself, as opposed to the remedy. But, such is definitely not the case with the Pennsylvania law. Here, the court below decided this important state question in conflict with the applicable state decisions and was thus led to a serious departure from the federal maritime law.

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6. October Term, 1958, No. 43, decided February 24, 1959.

3. There Is Presently Pending Before This Court Another Case Involving the Same Issue as Herein.

On March 2, 1959, this Court granted certiorari in *Goett v. Union Carbide Corporation*, October Term, 1958, No. 307. In that case, as here, a maritime worker was killed aboard a vessel within the navigable waters of a state. The Court of Appeals for the Fourth Circuit held that the right to recover for the death can be enforced only in accordance with the substantive law of the state. In petition for writ of certiorari filed therein, one of the questions presented was whether the right to recover for death occurring on navigable waters of a state is limited by a common law defense (assumption of risk) under the state substantive law, or whether this is governed by the federal maritime law.

The *Halecki* case, *supra*, involved this issue also. But, it was apparently decided by this Court upon its special facts and the general issue left undecided, so that certiorari was granted in the *Goett* case. The same general issue is involved in the instant case.

In comparable situations this Court has consistently confirmed the supremacy of the federal maritime law where it conflicts with a state provision. Even where a state-created *right* is applied in a maritime cause, the right has been enforced according to maritime principles although they are in direct conflict with state law. *The J. E. Rumbell*, 148 U. S. 1, 12, 17. See also *Union Fish Co. v. Erickson*, 248 U. S. 308, 314. *There is no reason why the requirement for uniformity should be subjected to an exception in the case of a maritime tort.*

Your petitioner earnestly submits that the instant case should be presented to this Court and reviewed together with the *Goett* case, so that all viewpoints upon this important question may be presented.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari be issued to the Court of Appeals for the Third Circuit.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MARTIN J. VIGDERMAN,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 of this Court.

MARTIN J. VIGDERMAN,
Counsel for Petitioner.